FROM A SCREAM TO A WHISPER: THE SUPREME COURT DOES LITTLE TO FIX ITS BANKRUPTCY COURT MESS (*EXECUTIVE BENEFITS INSURANCE AGENCY V. ARKISON (IN RE BELLINGHAM)*)

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Oh it's not easy to resist temptation
Walking around looking like a figment of somebody else's imagination[1]

Say what you will about Justice Clarence Thomas: unlike the protagonist in Elvis Costello's paean to libidinal frustration,[2] his unanimous opinion in *Executive Benefits Insurance Agency v. Arkison* (*In re Bellingham*),[3] certainly resists many temptations left by its predecessor, *Stern v. Marshall*,[4] to define what bankruptcy courts can and cannot do. Rather than take on *Stern*'s grand systemic concerns—the nature of the Article III "judicial power"[5]—*Bellingham* whimpers out on a technicality, concluding that problems created by *Stern* can be statutorily "severed" and thus resolved with the slice of a judicial knife.[6]

Some observers believe that *Bellingham* has "swept aside" the problems created by *Stern*.[7] Others are not so sanguine and worry that the "expense and delay" of litigating *Stern* questions will continue to burden a bankruptcy system ill-suited to absorb these costs.[8] If we recognize that *Stern* presented two types of uncertainties—(1) about its scope, and (2) about the process for resolving so-called "*Stern*" claims—it would appear that there is some merit to both views, although concerns about

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1. ELVIS COSTELLO & THE ATTRACTIONS, FROM A WHISPER TO A SCREAM (Columbia Records, 1981).

2. *Id.*

3. 134 S. Ct. 2165 (2014).

4. 131 S. Ct. 2594 (2011).

5. *Id.* at 2620.

6. *Bellingham*, 134 S. Ct. at 2173.

7. Ronald Mann, *Opinion Analysis: Bankruptcy Judges, Attorneys Breathe Sigh of Relief as Court Affirms Bankruptcy Court Authority*, SCOTUSBLOG (June 10, 2014, 10:07 AM), http://www.scotusblog.com/2014/06/opinion-analysis-bankruptcy-judges-attorneys-breathe-sigh-of-relief-as-court-affirms-bankruptcy-court-authority.

8. L. Rachel Lerman et al., *Supreme Court's Decision in* Bellingham *Leaves Key* Stern v. Marshall *Questions Unanswered*, NAT'L L. REV. (June 13, 2014), http://www.natlawreview.com/article/supreme-court-s-decision-bellingham-leaves-key-stern-v-marshall-questions-unanswered.

expense and delay have the upper hand.

Bellingham largely addresses the second uncertainty—process—and will thus reduce litigation costs to some extent. Nevertheless, it locks in a systemic redundancy that would appear to raise costs permanently by requiring "de novo" district court review of *Stern* claims.[9] More important, it fails to tell us what is within *Stern*'s scope to begin with. Worst of all, its characterization of the particular type of claim involved—a fraudulent transfer—as a "private" cause of action may be wrong, with important efficiency implications for the bankruptcy system.

Although *Bellingham* ignores the most important questions raised by *Stern*, there is cause for hope. Shortly after the Court announced its decision in *Bellingham*, it granted a petition for a writ of certiorari in *Wellness International Network, Ltd. v. Sharif*,[10] where it has agreed to consider some of the questions left by *Stern*, in particular whether parties can (be deemed to) consent to bankruptcy court adjudication.[11]

This essay briefly summarizes the problems created by *Stern* and five ways in which *Bellingham* failed to fix them.

I. *STERN*/*BELLINGHAM* REDUX

For those late to the show, *Stern* said that a certain class of claims in a bankruptcy case could not be adjudicated by Article I bankruptcy judges because those judges depend upon Congress for their jobs and salaries.[12] Giving them the "Article III judicial power" threatened the separation of powers created by the Constitution.[13] Thus, *Stern* was framed as a problem about how much "judging" bankruptcy judges could do without encroaching on Article III ("constitutional") courts.

Since its creation in 1978, there have been questions about this at the margins. Article I courts are created by Congress,[14] and their powers are limited both by the mandate Congress gives them (here under bankruptcy law), as well as the structure of separated powers envisioned by the Constitution. Ordinarily, and absent an exception, Article I courts cannot exercise the "Article III judicial power." Although the boundaries of this power are not clear, *Stern* was adamant that it included the power

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9. *Bellingham*, 134 S. Ct. at 2173.

10. 727 F.3d 751 (7th Cir. 2013), *cert. granted*, 82 U.S.L.W. 3496 (U.S. July 1, 2014) (No. 13-935).

11. Petition for Writ of Certiorari, *Sharif*, 727 F.3d 751 (No.13-935).

12. *Stern v. Marshall*, 131 S. Ct. 2594, 2601 (2011).

13. *Id.* at 2620 ("We cannot compromise the integrity of the system of separated powers and the role of the Judiciary in that system, even with respect to challenges that may seem innocuous at first blush.").

14. U.S. CONST. art. III, § 1.

to adjudicate "private" "common law" suits as understood in Westminster, England in 1789.[15] This presented a problem for bankruptcy courts, because much of what I have called the "ordinary work of bankruptcy courts"[16] involves adjudicating private common law disputes over such things as the allowance or disallowance of claims, the recognition and enforcement of liens, and so on.

In *Stern*, the litigation was not the "ordinary work" of bankruptcy courts. It involved a "tortious interference with an expected gift" counterclaim that a debtor's estate asserted against a creditor.[17] On pragmatic grounds, the matter should have been left to courts of general jurisdiction (in particular, the state court that had the underlying, original action). But Congress had created a list of things that it considered at the "core" of bankruptcy courts' power.[18] This list included counterclaims held against creditors,[19] which was technically the case in *Stern*.

Stern recognized that bankruptcy courts could adjudicate "private" "common law" disputes if the adjudication was part of the "claims allowance process"[20] (in *Stern*, the Court decided, confusingly, that it was not). But the Court did not tell us what that phrase meant, or the fate of two other theories on which bankruptcy court authority might have been sustained: (1) party "consent," and (2) the so-called "public right" doctrine announced in the 19th century case, *Murray's Lessee v. Hoboken Land & Improvement Co*.[21] Nor did *Stern* provide guidance on how courts should deal with so-called *Stern* claims—those that were statutorily "core" but nevertheless constitutionally impermissible.

Intuitively, one might think that *Stern* claims should simply go to the court of general jurisdiction that would otherwise adjudicate the dispute (e.g., a U.S. district court if there is diversity of citizenship). The problem is that the bankruptcy process does not work this way. While original jurisdiction of bankruptcy matters is vested in U.S. district

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15. *Id.* at 2609 (explaining that only Article III courts may adjudicate "traditional actions at common law tried by the courts at Westminster in 1789") (quoting *N. Pipeline Constr. Co. v. Marathon Pipe Line Co*., 458 U.S. 50, 90 (1982) (Rehnquist, J., concurring)).

16. Jonathan C. Lipson & Jennifer L. Vandermeuse, Stern, *Seriously: The Article I Judicial Power, Fraudulent Transfers, and Leveraged Buyouts*, 2013 WIS. L. REV. 1161, 1227–28.

17. *Stern*, 131 S. Ct. at 2617.

18. 28 U.S.C. § 157(b) (2012).

19. § 157(b)(2)(c).

20. *Stern*, 131 S. Ct. at 2618 ("[T]he question is whether the action at issue stems from the bankruptcy itself or would necessarily be resolved in the claims allowance process.").

21. 59 U.S. 272 (1855).

courts[22]—not bankruptcy courts—they have shown little interest in this work. They have thus used their power to "refer" most bankruptcy matters to bankruptcy courts.[23] If a matter was statutorily "core" and referred to a bankruptcy court, then a district court would have only appellate jurisdiction over it: it could not adjudicate it "de novo."[24]

Thus, *Stern* left a procedural "gap": the Supreme Court had said that bankruptcy courts lacked the power to adjudicate an (indeterminate) class of disputes, but there was no process for resolving them if one took the bankruptcy rules at face value.[25] The net result of *Stern* was an extraordinary amount of litigation over its meaning and implications. Because those in bankruptcy are usually broke, spending money to litigate these questions is especially troubling: bankruptcy was designed to promote settlements, not full blown litigations over constitutional niceties of little relevance to the ordinary operation of the system.

II. *STERN*'S BELLWETHER—FRAUDULENT TRANSFER

An important class of *Stern* claims involves suits to avoid fraudulent transfers. A fraudulent transfer is any transfer (which includes a debt or lien) for less than "reasonably equivalent value," where the transferor-debtor is (or is rendered) financially distressed (e.g., insolvent).[26] Until *Stern*, there was little question that bankruptcy courts could adjudicate such suits because they were "core" matters on the list of "ordinary bankruptcy work" created by Congress.[27] In most cases, there was no constitutional problem because the defendants would also be creditors, and so the litigation could be viewed as part of the "claims allowance process."

Problems could arise, however, if the trustee sued defendants who were not creditors—such as the selling shareholdings in a failed leveraged buyout or net takers in a Ponzi scheme—because the suit could not be resolved in the "claims allowance process." This derived from the Supreme Court's 1989 decision in *Granfinanciera, S.A. v. Nordberg*,[28] where the Court held that a defendant in a fraudulent transfer suit who

22. § 1334.

23. § 157.

24. *See* § 158.

25. *Exec. Benefits Ins. Agency v. Arkison (In re Bellingham)*, 134 S. Ct. 2165, 2173 ("Because § 157(b) does not explicitly authorize bankruptcy judges to submit proposed findings of fact and conclusions of law in a *core proceeding*, the argument goes, *Stern* created a 'gap' in the bankruptcy statute.").

26. 11 U.S.C. § 548(a)(1) (2012).

27. *See* 28 U.S.C. § 157(b)(2)(H) (2012).

28. 492 U.S. 33 (1989).

had not filed a claim in the debtor's bankruptcy had a right to a jury trial.[29] Congress thereafter dealt with this by providing that in such cases, district courts—not bankruptcy courts—should hold such jury trials. This has been the practice ever since. Bankruptcy courts could still enter dispositive motions—summary judgment, for example, as happened in *Bellingham*—prior to trial; but the jury, if any, would be empanelled by the district court.[30]

After *Stern*, courts split over whether bankruptcy courts retained the power to adjudicate fraudulent transfers. This was due principally to dicta in *Granfinanciera*, where Justice Brennan's majority opinion said that a fraudulent transfer suit was "quintessentially [a] suit[] at common law that more nearly resemble[d] state-law contract claims."[31] Because *Stern* had echoed this language, and *Granfinanciera* involved a fraudulent transfer, many thought this meant that fraudulent transfer suits were "*Stern*" claims.[32] Others disagreed.[33]

III. I DON'T WANT TO GO TO *BELLINGHAM*

Which takes us to *Bellingham*. This was a classic, somewhat seedy fraudulent transfer: the owner of two corporations transferred, without consideration, assets from one, which was in trouble (Bellingham), to the other, which was not.[34] He then put Bellingham into bankruptcy.[35] Bellingham's bankruptcy trustee sued to avoid the allegedly fraudulent transfer.[36] The trustee won summary judgment in the

29. *Id.* at 55, 58–59 (explaining that fraudulent conveyance suits were "more accurately characterized as a private rather than a public right" for jury-trial purposes when the defendant had not filed a proof of claim).

30. In *Germain v. Connecticut Nat'l Bank*, 988 F.2d 1323 (2d Cir. 1993), the Second Circuit Court of Appeals noted that bankruptcy courts may still have the power to conduct jury trials. *Id.* at 1332.

31. *Granfinanciera*, 492 U.S. at 56. *Granfinanciera* is either distinguishable (as being about the right to a jury, not the separation of power) or misinterprets the history it used. *Infra* Part III.

32. *See, e.g.*, *Rosenberg v. Harvey A. Bookstein*, 479 B.R. 584, 589 (D. Nev. 2012) ("[A] plain reading of the *Stern* decision in light of *Granfinanciera* reveals that fraudulent conveyance claims must be decided by an Article III court . . . .").

33. *See, e.g.*, *In re Refco Inc.*, 461 B.R. 181, 192 (S.D.N.Y. 2011) ("Given the . . . limiting language in *Stern* . . . and the role of fraudulent transfer claims under the Bankruptcy Code, . . . Article III of the Constitution does not prohibit the bankruptcy courts' determination of fraudulent transfer claims . . . by final judgment.").

34. *Exec. Benefits Ins. Agency v. Arkison (In re Bellingham)*, 134 S. Ct. 2165, 2168–69 (2014).

35. *Id.* at 2169.

36. *Id.*

bankruptcy court, from which the defendants appealed to a U.S. district court.[37] After a de novo review (note: this is important), it affirmed.[38]

Since there was no real question about merit—the defendant clearly engaged in a fraudulent transfer—the important defenses were procedural; in particular, whether the defendant had "consented" to bankruptcy court adjudication.[39] "Because [the defendant] waited so long to object, and in light of its litigation tactics," the Ninth Circuit observed, "we have little difficulty concluding that [the defendant] impliedly consented to the bankruptcy court's jurisdiction."[40] Alternatively, the court of appeals upheld summary judgment because the district court had affirmed the bankruptcy court's adjudication following "de novo" review.[41]

Bellingham was considered important because many expected the Court to indicate whether (or to what extent) *Stern* affected the capacity to "consent" to an Article I adjudication. "Consent" in this context presents a complex and difficult question, with implications far beyond the bankruptcy system. There are thousands of Article I judges—think of tax courts, administrative law judges, magistrates—whose work often depends on parties consenting to their authority. If, as the defendants in *Bellingham* argued, parties could not consent to an Article I adjudication, the *Stern* problem would spill into fields well beyond bankruptcy. Thus, many assumed that the Court agreed to hear *Bellingham* to provide guidance on this issue.[42]

IV. "NO ACTION"

They were wrong.

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37. *Id.*

38. *Id.*

39. *Id.* In *Bellingham*, the defendant initially responded to the fraudulent transfer complaint by demanding its right to a jury trial "under *Granfinanciera*, which the district court treated as a motion to withdraw the reference." *In re Bellingham Ins. Agency*, 702 F.3d 533, 568 (2012), *aff'd*, 134 S. Ct. 2165 (2014) ("But EBIA elected not to pursue a hearing in an Article III court. Instead, EBIA petitioned the district court to stay its consideration of the motion to withdraw the reference to give the bankruptcy court time to adjudicate the Trustee's motion for summary judgment."). Although these motions were made in 2010, *Stern* was not decided until June 2011. *See Stern v. Marshall*, 131 S. Ct. 2594 (2011).

40. *In re Bellingham Ins. Agency*, 702 F.3d at 568.

41. *Id.* at 566.

42. And thus the Court would resolve a circuit split on the matter. *Compare id.* at 567 (stating that failure to object to bankruptcy court authority timely waives constitutional objection), *with Waldman v. Stone*, 698 F.3d 910, 915, 917–18 (6th Cir. 2012) (stating that a creditor did not consent to bankruptcy court authority over fraud claims against it even though jurisdictional objections were raised late in the case).

Rather than tell us anything about the role that consent plays in the scope of bankruptcy court power, the Supreme Court looked to the rules of bankruptcy procedure. Because the enacting legislation contained a severability provision,[43] the Court concluded that it could excise those provisions of the rules of procedure that permit a bankruptcy court to fully adjudicate a fraudulent transfer suit as a "core" matter.[44] "The plain text of this severability provision closes the so-called 'gap' created by *Stern* claims," Justice Thomas explained.[45] "When a court identifies a claim as a *Stern* claim, it has necessarily 'held invalid' the 'application' of § 157(b)—i.e., the 'core' label and its attendant procedures—to the litigant's claim."[46]

V. FROM A SCREAM TO A WHISPER

Does *Bellingham* "close the *Stern* gap," as Justice Thomas promised, silencing the din of litigation over every aspect of *Stern*'s meaning and implications?

Probably not, for at least five reasons.

First, it is not entirely clear that "severability" alone is enough. To say that a *Stern* claim is no longer statutorily "core" is only half the battle. One must still find something affirmative in the statute indicating what becomes of that claim. The bankruptcy process does not do this directly. Instead, as noted above, district courts may refer bankruptcy matters to bankruptcy courts. Presumably, after *Bellingham*, U.S. district courts will amend their local referral rules to affirmatively provide that *Stern* claims will be treated as they were in *Bellingham*: they will be adjudicated provisionally by the bankruptcy judge, who will produce "proposed findings of fact and conclusions of law," subject to de novo review by the district court. But, this may require amendments to local rules, which may not be forthcoming.

Second, *Bellingham* tells us how to resolve *Stern* claims, but does not tell us what those claims are. Indeed, Justice Thomas merely "assume[s] without deciding[] that the fraudulent conveyance claims in this case are *Stern* claims."[47] It appears he made this assumption because

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43. "If any provision of this Act or the application thereof to any person or circumstance is held invalid, the remainder of this Act, or the application of that provision to persons or circumstances other than those as to which it is held invalid, is not affected thereby." *Exec. Benefits Ins. Agency v. Arkison (In re Bellingham)*, 134 S. Ct. 2165, 2173 (2014) (quoting Act of July 10, 1984, Pub L. No. 98-353, 98 Stat. 344).

44. *Id.* at 2174–75.

45. *Id.* at 2173.

46. *Id.*

47. *Id.* at 2174.

"the fraudulent conveyance claims in this case are 'not . . . core.' The Ninth Circuit held—and no party disputes—that Article III does not permit these claims to be treated as 'core.'"[48]

This is true, but not for the reasons he seems to assume. Fraudulent transfer suits are clearly "core" as a statutory matter.[49] Here, however, the defendants in *Bellingham* had sought to withdraw the reference in order to have a jury trial.[50] As noted above, if a defendant seeks a jury trial in a fraudulent transfer suit, it is likely to end up in the district court, meaning that it will not be *treated* as core. But that is because of special rules and concerns about jury trials expressed by *Granfinanciera*, not because fraudulent transfer claims are not "core." Indeed, the whole problem created by *Stern* was that it created a mismatch between what Congress said was "core" and what the Court said bankruptcy courts could treat as core. If the fraudulent transfer suit in *Bellingham* was not core, there would have been no *Stern* problem to begin with.

This reflects a more general tendency of the Court to conflate the right to a jury trial and the scope of the Article III judicial power. The conflation is a problem because it perpetuates a mistaken understanding of the nature of fraudulent transfer suits; in particular, that a fraudulent transfer suit is a matter of "private right" for Article III purposes. According to Justice Thomas, the Supreme Court in *Granfinanciera* "held that a fraudulent conveyance claim under Title 11 is not a matter of 'public right' for purposes of Article III."[51]

This is questionable. As I (and others) have explained elsewhere,[52] the decision in *Granfinanciera* may tell us something about the right to a jury trial in bankruptcy, but its discussion of the "public" or "private" character of a fraudulent transfer suit for Article III—judicial power—purposes is dicta, as it simply was not an issue in that case.[53]

48. *Id.*

49. 28 U.S.C. § 157(b)(2)(H) (2012).

50. *Exec. Benefits Ins. Agency v. Arkison (In re Bellingham Ins. Agency, Inc.)*, 702 F.3d 553, 568 (9th Cir. 2012) ("EBIA initially demanded a jury trial, invoking its rights under *Granfinanciera*, which the district court treated as a motion to withdraw the reference.").

51. *Bellingham*, 134 S. Ct. at 2169 n.3 (citing *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 55 (1989)).

52. *See, e.g.*, Ralph Brubaker, *A "Summary" Statutory and Constitutional Theory of Bankruptcy Judges' Core Jurisdiction after* Stern v. Marshall, 86 AM. BANKR. L.J. 121 (2012); Lipson & Vandermeuse, *supra* note 16.

53. The opening line in Justice Brennan's majority opinion shows this: "The question presented is whether a person who has not submitted a claim against a bankruptcy estate has a right to a jury trial when sued by the trustee in bankruptcy to recover an allegedly fraudulent monetary transfer." *Granfinanciera*, 492 U.S. at 36.

Indeed, fraudulent transfer suits have historically had important public qualities: when brought as part of a bankruptcy case, they are probably more "public" than "private."[54] Among other things, the fraudulent transfer cause of action was created by the English Parliament—not by the common law—in the 16th Century Statute of Elizabeth.[55] Although fraudulent transfer law came to permit private creditor suits, it was initially intended in large (perhaps most) part to benefit the Crown, which used it to penalize religious dissenters and to raise revenue (the Crown got half of any recovery).[56] By the framing era, a fraudulent transfer was an "act of bankruptcy," which in England carried criminal penalties.[57] Contrary to Justice Brennan's majority opinion in *Granfinanciera* (echoed by Chief Justice Roberts in *Stern*), a fraudulent transfer suit was not "quintessentially [a] suit[] at common law that more nearly resemble[d] state-law contract claims."[58] Rather, it was (and remains) a second-order remedy that solves significant collective action—that is, public—problems.

This matters because if a fraudulent transfer suit involves a "public right" for Article III purposes, then well-established precedent (e.g., *Murray's Lessee*, noted above) suggests that bankruptcy courts *do* have the constitutional authority to adjudicate them if Congress so provides. Recognizing this would not only comport with the historical character of fraudulent transfer suits, but would also create important efficiencies, because it would avoid fights over the role that "consent" may (or may not) play in this arena.

Which is the third problem *Bellingham* leaves us: it tells us nothing about the role that consent plays in bankruptcy (and thus other Article I) disputes.[59] Is consent an alternative to the severability/de-novo review strategy it seems to promote? If so, what conduct shows it: The indolence of the lawyers in *Bellingham*, who waited to raise the

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Although the Court discussed Article III more generally, it did so only in service of answering this question.

54. Much of this analysis is drawn from Lipson & Vandermeuse, *supra* note 16.

55. Statute of Elizabeth, 13 Eliz., c. 5 § 2 (1571).

56. Some (but not all) colonies (and then states) carried some of this public purpose forward, so that at or around the time of ratification (1789) Connecticut, New Jersey, and Vermont provided that the local government would receive a portion of any recovery. *See* ORLANDO F. BUMP, FRAUDULENT CONVEYANCES: A TREATISE UPON CONVEYANCES MADE BY DEBTORS TO DEFRAUD CREDITORS 586, 588, 591 (New York, Baker, Voorhis & Co. 1872).

57. GARRARD GLENN, 1 FRAUDULENT CONVEYANCES AND PREFERENCES §§ 58–62b (rev. ed. 1940).

58. *Granfinanciera*, 492 U.S. at 56.

59. *Exec. Benefits Ins. Agency v. Arkison (In re Bellingham)*, 134 S. Ct. 2165, 2175 ("In light of the procedural posture of this case, however, we need not decide whether EBIA's contentions are correct on either score.").

constitutional issue until after briefing in the court of appeals? Or must courts find something more formal, akin to an arbitration clause? If consent is not a basis for bankruptcy court adjudication, is that because it is structurally impermissible—that is, parties cannot consent to an Article I adjudication, ever, as the *Bellingham* defense argued?

At this point, we do not know. But, we may soon. A few weeks after deciding *Bellingham*, the Court granted a petition for a writ of certiorari in *Sharif*, a case from the Seventh Circuit Court of Appeals, which held that "a constitutional objection based on *Stern* is not waivable because it implicates separation-of-powers principles."[60] By granting *Sharif*, the Court has agreed to consider, among other things, "[w]hether Article III permits the exercise of the judicial power of the United States by the bankruptcy courts on the basis of litigant consent, and if so, whether implied consent based on a litigant's conduct is sufficient to satisfy Article III." [61]

Until we know more about consent, we can expect that *Stern* claims—whatever they may be—will in most cases now go to U.S. district courts for de novo review, which leads to a fourth problem: *Bellingham* locks in a needless layer of added cost. Prior to *Bellingham*, Bankruptcy Judge Joan Feeney had argued that this approach "would only add permanence and legitimacy to the current problem inherent in the bankruptcy system, namely that litigants need to visit both the bankruptcy court and district court to resolve their disputes."[62] She is right. As Congressman Peter Rodino explained over thirty years ago, "One of the major reasons for the separate bankruptcy court, which has long been in existence, is the need for expedition in bankruptcy cases."[63]

This, then, bespeaks the fifth problem: whether the Court could "sever" the rules of bankruptcy procedure to "fill" the *Stern* gap depended on whether the Bankruptcy Code would "remain[] 'fully operative as a law'" despite the severance.[64] The Court unanimously believed that it would, and most would not seriously claim otherwise. It

60. *Wellness Int'l Network, Ltd. v. Sharif*, 727 F.3d 751, 755 (7th Cir. 2013). Adding to, or reflecting, confusion over the role of consent here, two weeks after the *Sharif* decision, a different Seventh Circuit panel (with one judge common to *Sharif*) found "no constitutional problem when a bankruptcy judge adjudicates a trustee's avoidance actions against creditors who have submitted claims." *Peterson v. Somers Dublin Ltd.*, 729 F.3d 741, 747 (7th Cir. 2013).

61. Petition for Writ of Certiorari, *Sharif*, 727 F.3d 751 (No.13-935).

62. *See* Joan N. Feeney, *Statement to the House of Representatives Judiciary Committee on the Impact of* Stern v. Marshall, 86 AM. BANKR. L.J. 357, 359–60 (2012).

63. 129 Cong. Rec. H31–32 (daily ed. Jan. 3, 1983) (introduction of H.R. 3 by Rep. Peter Rodino).

64. *Bellingham*, 134 S. Ct. at 2173 (quoting *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 509 (2010)).

is nevertheless important to remember that bankruptcy is meant to be a pragmatic process where speed and efficiency are at a premium. As legislative history explains:

> In establishing the bankruptcy judicial system for the Nation, two considerations must be paramount: (1) judicial economy and efficiency and (2) constitutionality. The bankruptcy court system must provide judicial services at a high level of efficiency and competence, and, at the same time, must meet the requirements of the Constitution.[65]

Bankruptcy lawyers are highly sensitized to issues of "priority" and so will note immediately that the first consideration is efficiency; constitutionality is second and (by inference) subordinate. *Stern* and *Bellingham* get this backwards, and leave a bankruptcy system with what appears to be permanently higher costs in the service of ill-defined constitutional values. To the extent one believes that judicial economy and efficiency are central to the bankruptcy process, perhaps *Bellingham*'s "severability" tactic will not leave the Bankruptcy Code "fully operative" after all.

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In a Supreme Court term marked by near-operatic howling over campaign finance and the religious liberty rights of corporations, a decision as pithy and technical as *Bellingham* is likely to be ignored by all but aficionados. This is unfortunate. The operation of the bankruptcy system affects all of us. The more it costs to operate that system, the less effective it will be. *Bellingham* will keep its costs artificially high for some time. This is nothing to sing about. Let us hope that in *Sharif* the Court in its next term offers more than lip service and better defines the scope of bankruptcy court power.

65. H.R. Rep. No. 97-807, at 10 (1982).